IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.8.2006

CORAM

THE HONOURABLE Mrs.JUSTICE PRABHA SRIDEVAN

WRIT PETITION NO.9711 of 1999 and
W.M.P.No.26885 of 2000

M/s.Dohler Flavorade (P)Ltd.,
No.8, SIDCO Industrial Estate
Alathoor, Tiruporur Taluk,
Chengai Anna District-603 110 ... Petitioner

-vs.-

1.The Assistant Commissioner
of Central Excise,
Chengleput Division,
Tambaram, Chennai-600 045

2.The Commissioner of
Central Excise,
Chengleput Division,
Tambaram, Chennai-600 045 ... Respondents

Writ petition filed under Article 226 of the Constitution of India praying to issue writ of certiorarified mandamus to quash the order of the second respondent dated 28.5.1999 and direct the second respondent to grant waiver of predeposit of duty demanded by the first respondent in his order dated 22.1.1999.

For petitioner ...Mr.S.Raghunathan
For respondents ...Mr.A.S.Vijayaraghavan-ACGSC.

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ORDER

This writ petition is against the impugned order refusing to afford personal hearing, though it is specifically prayed for.

2. The petitioner is the manufacturer of flavoured essence, food colour preparations, emulsions, soft drink concentrates etc., Relying on the decision of the CEGAT in the case of Bush Boake Allen (India) Ltd., Vs. Collector of Central Excise, Madras holding that mere dilution of food

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colour powder and packing into containers did not amount to manufacture attracting levy of central excise duty, the petitioner did not avail modvat nor did they pay any duty for its products. From May, 1997, the classification for the product in the Central Excise Tariff was changed from 3204.90 and it was classified under sub heading 2109.99. The petitioner started paying duty on clearance from 18.9.1997. By the order dated 22.1.1999, the first respondent reclassified the food colour preparations under sub heading 2107.91 up to 15.3.1995 and thereafter under 2100.10. According to the petitioner, before such reclassification, the petitioner should have been afforded an opportunity. A demand was made for payment of the differential duty of Rs.49,67,295/-. Aggrieved by this, the petitioner filed an appeal to the second respondent, sought for waiver of pre deposit and requested personal hearing. The request for personal hearing was refused and the prayer for waiver of pre deposit was rejected.

3. Learned counsel appearing for the petitioner relied on SANGFROID REMEDIES LTD v. UNION OF INDIA (1998(103) E.L.T.5(S.C.) where it was held that when the appeal was filed on the ground of denial of opportunity and non issuance of notice, insistence on pre deposit was not sustainable.

4. Mr.A.S.Vijayaraghavan,learned Additiona Central Government Standing Counsel reiterated the averments in the counter and submitted that the petitioner has not made out prima facie case and even if the matters were to be remitted for fresh consideration, condition should be imposed.

5. In AIR 1996 Supreme Court 1509 (UNION OF INDIA v. JESUS SALES CORPORATION), Supreme Court held that in an application for dispensing with the requirement of pre deposit, hearing the applicant is not necessary before deciding the application. In fact this is referred to in the impugned order.

6. In 2001 (127) E.L.T. 338(Mad.) (ITC LIMITED v. COMMISSIONER OF CENTRAL EXCISE (A), CHENNAI) the circular dated 30.3.1999 was challenged. This impugned circular indicated that personal hearing should be granted. The crucial portion of the circular reads as follows:-

> "From the above it is evident that though discretion is vested with the Appellate Authority to give personal hearing in the facts and circumstances of the particular case, before disposing of stay petitions, but this should be more of an exception and not the normal rule. Commissioner (Appeals) do not commit any irregularity if they dispose of the petitions for dispensation of pre-deposit without hearing advocates or parties concerned. They must, however, in such cases pass a reasoned order in an objective manner

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considering the facts as given in representation/stay petition."

This was questioned by this court.

"Much reliance had been placed by the Central Board in the decision of the Apex Court in Union of India v.Jesus Sales Corporation reported in (1996)4 Supreme Court Cases (69), N.P.Singh, J. while disposing of the Civil Appeal held that mere failure to afford an opportunity of hearing an application for stay/dispense with pre-deposit, on the facts of the said case, it was held that the order is not vitiated and is not liable to be quashed being violative of principles of natural justice. The said pronouncement of the Apex Court has to be confined to the facts of the said case and nowhere the Apex Court in the said case has ruled that the principles of natural justice or audi alteram partem will have no application in respect of an application for stay/ exemption before the appellate authority."

"Hitherto before and in particular before the impugned circular issued by the Central Board, opportunity of hearing was being afforded. It is also admitted that other commissioners (Appeals) afford opportunity of hearing while passing orders of stay/exemption application. There is no reason at all for this second respondent alone to deviate and such deviation also offends the concept of legitimate expectation which has gained importance."

7. In the present case, a specific prayer for personal hearing was made and if the authority is of the opinion that the personal hearing is not necessary, then reasons must have been given for rejecting such prayer.

8. Recently in TRANSMISSION CORPORATION OF A.P. LTD. & OTHERS v. M/S.SRI RAMA KRISHNA RICE MILL (2006(3)Law Weekly 332), the Supreme Court while considering the right to cross examine the officials of the Electricity Corporation held "It cannot be laid down as a rule of universal application that whenever the statement of departmental officer is pressed into service for the purpose of adjudication, a right of cross examination is in built." and "If an application is made requesting for grant of an opportunity to cross examine any official, the same has to be considered by the adjudicating authority who shall have to either grant the request or pass a reasoned order if he chooses to reject the application.....There has to be application of mind by him." It is the petitioner's case that the revision of the classification without granting

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an opportunity is arbitrary and that it cannot be done from 1997. A specific prayer for personal hearing was made in the reference application. No reason is given for rejecting the prayer. In 2001 (127) E.L.T. 338(Mad.) E.PADMANABHAN,J. has spelt out the various circumstance which may warrant personal hearing. In the circumstances the rejection of the prayer for waiver of pre deposit must be set out.

9. In these circumstances, and especially when the petitioner has enjoyed the order of unconditional stay for a period of 7 years and when the matter is being remitted for decision by the Appellate Authority within a time frame to be fixed, it is not necessary to call upon the petitioner to make a pre deposit.

10. In the result, this writ petition is allowed and the matter is sent back to the Appellate Authority for hearing the case on merits and the Appellate Authority shall do so within a period of six weeks from the date of receipt of a copy of this order without insisting upon the pre deposit. Consequently, no order is necessary in W.M.P. No.26885 of 2000 and the same is closed.

tsv.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Assistant Commissioner
of Central Excise,
Chengleput Division,
Tambaram, Chennai-600 045

2.The Commissioner of
Central Excise,
Chengleput Division,
Tambaram, Chennai-600 045

1 cc To Mr.V.Natraj, Advocate, SR.34043.
1 cc To Mr.A.S.Vijayaragavan, ACGSC, SR.33988.

W.P.No.9711 of 1999 &
connected WMP.

KM(CO)
RVL 24.08.2006

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